

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

SHANNON PEREZ, et al.,

*Plaintiffs,*

- and -

EDDIE BERNICE JOHNSON, et al.,

- and -

TEXAS STATE CONFERENCE OF  
NAACP BRANCHES, et al.,

*Plaintiff Intervenors,*

v.

RICK PERRY, et al.,

*Defendants,*

CIVIL ACTION NO.  
SA-11-CA-360-OLG-JES-XR  
[Lead case]

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MEXICAN AMERICAN LEGISLATIVE  
CAUCUS, TEXAS HOUSE OF  
REPRESENTATIVES (MALC),

*Plaintiffs,*

- and -

HONORABLE HENRY CUELLAR, et al.,

*Plaintiff Intervenors,*

v.

STATE OF TEXAS, et al.,

*Defendants*

CIVIL ACTION NO.  
SA-11-CA-361-OLG-JES-XR  
[Consolidated case]

TEXAS LATINO REDISTRICTING TASK  
FORCE, et al.,

*Plaintiffs,*

v.

RICK PERRY, et al.,

*Defendants,*

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MARAGARITA v. QUESADA, et al.,

*Plaintiffs,*

v.

RICK PERRY, et al.,

*Defendants,*

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JOHN T. MORRIS,

*Plaintiff,*

v.

STATE OF TEXAS, et al.,

*Defendants,*

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CIVIL ACTION NO.  
SA-11-CA-490-OLG-JES-XR  
[Consolidated case]

CIVIL ACTION NO.  
SA-11-CA-592-OLG-JES-XR  
[Consolidated case]

CIVIL ACTION NO.  
SA-11-CA-615-OLG-JES-XR  
[Consolidated case]

EDDIE RODRIGUEZ, et al.,

*Plaintiff,*

V.

STATE OF TEXAS, et al.,

*Defendants.*

CIVIL ACTION NO.  
SA-11-CA-635-OLG-JES-XR  
[Consolidated case]

**RESPONSE OF TEXAS LATINO REDISTRICTING TASK FORCE, ET AL.**  
**TO POST-TRIAL BRIEFS**

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**RESPONSE OF TEXAS LATINO REDISTRICTING TASK FORCE, ET AL.**  
**TO POST-TRIAL BRIEFS**

Plaintiffs in the case originally styled *Texas Latino Redistricting Task Force, et al. v. Perry, et al.*, No. 5:11-cv-490, (the “*Latino Task Force* Plaintiffs”) file this Response to post-trial briefs<sup>1</sup> and show the Court the following:

**I. INTRODUCTION**

In defense of claims of intentional discrimination, the State argues that it protected incumbents and generally favored Republicans over Democrats and thus there is no legal violation.

Invoking partisanship is not a magic bullet that defeats intent claims if, as here, the Task Force Plaintiffs proved that in the challenged districts the State purposefully reduced the strength of Latino voters and subordinated considerations of incumbency protection and partisanship to race. In El Paso, Bexar County and South and West Texas, the growing Latino electorate, and its potential to oust non-Latino-preferred incumbents, became the overriding preoccupation of redistricters. Redistricters and elected officials referred frequently to the race of voters when discussing the creation of new districts and modification of existing districts. In the REDAPPL system, redistricters shaded for race when swapping geography into and out of the challenged districts and then they used statistical analyses of Latino ability to elect (the OAG10) to measure how closely they met their redistricting goals.

Redistricters subverted the Voting Rights Act by using race to create sham districts with a specific Latino demographic that they knew could not elect the Latino candidate of choice.

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<sup>1</sup> The Latino Task Force Plaintiffs’ Post-Trial Brief is found at Dkt. 1282, and is referred to as “Task Force Post-Trial Brief.” The State Defendants’ Post-Trial Brief is found at Dkt. 1272, and is referred to as “State Post-Trial Brief.” The Joint LULAC, Quesada and Rodriguez Plaintiffs’ Post-Trial Brief is found at Dkt. 1277, and is referred to as “Joint LULAC, Quesada and Rodriguez Post-Trial Brief.”

The evidence in the case demonstrates overwhelmingly that redistricters altered Latino-majority districts to preserve the incumbency of candidates who were not Latino-preferred in a manner that “bears the mark of intentional discrimination.” *LULAC v. Perry*, 548 U.S. at 440.

Redistricters used race even when it had nothing to do with partisanship or incumbency protection, such as in the Dallas-Ft. Worth area where, after achieving partisan goals, the State drew district lines purely on the basis of race to allocate Latinos and African Americans to specific districts. None of the race-based redistricting by Texas served a compelling state interest.

Finally, the Task Force Plaintiffs’ section 2 claims are live and the evidence in support of those claims remains unchallenged.

## **II. ARGUMENT**

### **A. Intentional Racial Discrimination in Violation of the Fourteenth Amendment**

The Task Force Plaintiffs assert three distinct claims of intentional discrimination in violation of the Fourteenth Amendment. First, the State intentionally diluted Latino voting strength in the House and congressional plans by purposefully minimizing the number of Latino opportunity districts and by drawing district lines to dilute Latino voting strength.<sup>2</sup> Second, whether or not the State intended to dilute Latino voting strength, and whether or not the districts have a discriminatory impact on Latino voting strength, the State used race as the predominant factor to draw HDs 78 and 117 and CD23 in violation of the Fourteenth Amendment. Third, the State used race as a predominant factor to draw district boundaries in Tarrant and Dallas counties in violation of the Fourteenth Amendment. With respect to the second and third claims, the

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<sup>2</sup> As described in the Task Force Plaintiffs’ post trial brief, the Task Force Plaintiffs bring their the claim of intentional vote dilution under section 2 and the Fourteenth Amendment. The legal standard for these two claims is the same. *See generally City of Mobile, Ala. v. Bolden*, 446 U.S. 55 (1980); *see also Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) (“To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.”).

State's predominant use of race was not narrowly tailored to serve a compelling state interest. These three claims are often discussed together below, but proof of any one separately establishes liability under the Fourteenth Amendment.

# **1. Intentional Vote Dilution**

## **a. Intent to Discriminate**

The State incorrectly limits Fourteenth Amendment liability to situations in which an actor sets out purposefully and exclusively to injure a racial minority group.

Contrary to the State's assertion, the Fourteenth Amendment does not require Plaintiffs to prove "intent to *injure* plaintiffs because of their race or ethnicity," or that State acted "to *harm* minority voters." State Post-Trial Brief at 8 and 9 (emphasis added). In fact, the use of race by the State can violate the Fourteenth Amendment whether or not the State intends to harm racial minorities. *See Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications[.]"); *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2417 (2013) ("It is therefore irrelevant that a system of racial preferences in admissions may seem benign."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995).

The State also cabins 'intent' under the Fourteenth Amendment to exclude dilution of Latino voting strength in order to prevent the election of Latino-preferred candidates. Under this view, if the State only intends to prevent a growing Latino electorate from ousting incumbents and electing Latino candidates of choice (whether for reasons of partisanship, or incumbency protection, or both), the State does not intend to "harm" Latino voters, and thus does not intend to discriminate on the basis of race. (State Post-Trial Brief at 8-9).

However, the Supreme Court has made clear that when the State redistricts to take "away

the Latinos' opportunity because Latinos were about to exercise it,” such action “bears the mark of intentional discrimination that could give rise to an equal protection violation.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006). Unlike *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979), where the State acted to benefit military veterans and the challenged law had an ancillary adverse effect on women, in this case the State acted to insulate incumbents specifically from the Latino vote. Compare *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 274-275 (1979) (“the purposes of the statute [giving public employment preferences to military veterans] provide the surest explanation for its impact.”) with *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 441 (2006) (“The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district.”).

The State’s argument regarding causation is similarly misplaced. Even when Texas contends that the challenged district lines would have been the same if the State had relied exclusively on partisanship or incumbency protection, the State cannot avoid the fact that the State’s singular goal was to avoid election losses by candidates not favored by Latino voters.<sup>3</sup> Unlike *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), in which a defendant school district had independent reasons to terminate the plaintiff in addition to the plaintiff’s protected speech, the State here offers no reasons for its challenged line-drawing other than to prevent the election losses of non-Latino-preferred incumbents in Latino-majority districts. Dressing up the same actions as “partisanship” or “incumbency protection” does not change the fact that there was one motivation for the line drawing -- to prevent Latino voters from ousting incumbents. See *Scott v. Flowers*, 910 F.2d 201, 209 (5th Cir. 1990) (finding that

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<sup>3</sup> The Task Force Plaintiffs also demonstrate in section II.A.6. below that the State’s pursuit of partisan goals would have led to very different district boundaries for the challenged districts.

reprimand of employee was supported by only one reason); *see also Petramale v. Local No. 17 of Laborers Int'l Union of N. Am.*, 736 F.2d 13, 18 (2d Cir. 1984) (“We hold that defendants may not at this late stage seek to disentangle from the web they wove around [plaintiff] one charge which, standing alone, might pass statutory muster.”).

**b. Discriminatory Impact**

Texas asserts that plaintiffs must demonstrate discriminatory impact as part of their intentional vote dilution claim but does not address plaintiffs’ evidence of the dilutive effects of H283 and C185.

In H283, redistricters eliminated Latino opportunity district HD33 and did not add any new Latino opportunity districts to the plan. As a result, H283 included fewer Latino opportunity districts than had existed in the benchmark plan. (FOF 2; FOF Appx. B at ¶ 911). In El Paso County and Bexar County, both of which have a strong majority of Latino voters, redistricters lowered the SSVR of HD78 and HD117. The new HD78, with 47.1% SSVR, remained a district in which Latinos could not elect their candidate of choice a majority of the time, despite the fact that the remaining state house districts in El Paso County included 81.2%, 81.3% 66.4% and 69.3% SSVR. (FOF Appx. B at 92, 98, 104, 116). In Bexar County, the changes to HD117 had their intended effect: redistricters flipped the election performance of HD117 so that Latinos did not elect their candidate of choice a majority of the time, in order to “provide Representative Garza with an opportunity to be reelected[.]” (State Post-Trial Brief at 55).<sup>4</sup> Redistricters also reduced the SSVR in HD117 to 50.1% while leaving higher SSVR in

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<sup>4</sup> Rep. Garza had been defeated when he ran in 2008 for state representative in House District 117, but was elected in 2010 with a margin of 1,070 votes. (FOF 596-597). Rep. Garza testified that he believed that 2012 was going to be a tougher race than 2010 for him, and in drafting his ideal district map for the delegation he wanted to be re-elected. (FOF 599).

districts adjacent to HD117, including HD118, HD124 and HD125, despite the fact that Bexar County was a drop-in county and drawn on the county level. (US Exh. 374).

In the congressional plan, redistricters' own statistical analyses showed that their changes to CD23 reduced the election of a Latino preferred candidate from 3 out of 10 to 1 out of 10 elections. (FOF 1362). The Texas Legislative Council reaggregated election analysis of all 14 elections that were held in the time period of the OAG10 showed that the changes to CD23 reduced the election of a Latino preferred candidate from 7 out of 14 to 3 out of 14 elections. (FOF 930, PL Exh. 291).

Although David Hanna, an attorney with the Texas Legislative Council agreed that it was certainly possible to balance the Latino population between CD28 and CD23 to create stronger Latino electoral opportunity in CD23, Texas redistricters did not take those steps and as a result C185, even with the new CD35, held Latino voters in Texas to the same level of electoral opportunity that they had in 1991. (FOF 1448).

Furthermore, the removal of majority-Latino Nueces County, with its more than 200,000 Latinos, had a significant negative impact on the ability to draw non-dilutive congressional districts in South Texas. (Task Force Post-Trial Brief at 107).

Perhaps because the dilutive effect of H283 and C185 are so obvious, the State retreats to the position that there can be no adverse effects of redistricting plans that were replaced by the Court's interim plans for the 2012 elections. However, even assuming that the Court's interim plans made progress towards ameliorating vote dilution in the districts they modified, the interim plans did not address all of plaintiffs' claims of intentional vote dilution, including the lopsided allocation of Latino voting strength across El Paso and Bexar County House districts, loss of a second Latino opportunity state house district in Nueces County, the failure to

increase the number of Latino opportunity state house districts in South Texas, the loss of Nueces County to the Latino opportunity congressional districts in South Texas and the lopsided distribution of Latino voting strength across South and West Texas congressional districts.

## 2. **Predominant use of Race**

Texas violated the Fourteenth Amendment when it engaged in “the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes.” *Shaw v. Reno*, 509 U.S. at 640 (quoting *Davis v. Bandemer*, 478 U.S. 109 (1986)).

It is permissible for a state to be “*aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.” *Shaw v. Reno*, 509 U.S. at 646. For example, when a group of people of the same race live in the same geographic area, redistricters may include those voters in a district and be aware of race as they draw “to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.” *Id.*<sup>5</sup>

However, when race becomes “the legislature’s dominant and controlling rationale in drawing its district lines,” and “the legislature subordinate[s] traditional race-neutral districting principles ... to racial considerations,” strict scrutiny applies. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (quoting *Miller*, 515 U.S., at 913 and 916). As explained by the Supreme Court, “Race-based assignments ‘embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion

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<sup>5</sup> Furthermore, the creation of a majority minority district, by itself, does not trigger strict scrutiny. See *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (“After all, the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.”); see also *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 168 (1977).

barred to the Government by history and the Constitution.’ . . . They also cause society serious harm.” *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (citations omitted).

In its brief, Texas urges this Court to defer to its redistricting choices but “racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

With respect to the challenged districts in H283 and C185, the Task Force Plaintiffs have met their burden “to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.” *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762 (1995).

The Task Force Plaintiffs demonstrated that the State made predominant use of race in violation of the Fourteenth Amendment in two ways. First, the State used race as the predominant criteria under which to craft districts with a specific threshold of Latino population and specific indicators of Latino electoral strength. Second, the State used race as the sole criterion to assign voters into and out of congressional districts in Dallas-Ft. Worth, including the assignment of Latinos into the “lightning bolt” of CD26 and the assignment of Latinos into CD6 in Dallas County. In both cases, there was no compelling state interest served by the use of race.

Here, although there is ample circumstantial evidence that the challenged districts depart from the traditional goals of preserving “compactness, contiguity, and respect for political

subdivisions,” *Shaw I*, 509 U.S. at 647, in light of the direct evidence provided by redistricters that they relied on race to draw district boundaries it is difficult “to see how the District Court could [reach] any conclusion other than that race was the predominant factor in drawing” the challenged districts. *Miller v. Johnson*, 515 U.S. at 918.

### **3. Direct Evidence of use of Race in HDs 78 and 117 and CD23**

It is undisputed that HDs 78 and 117 and CD23 were purposefully created as majority-Latino districts. *See Bush v. Vera*, 517 U.S. 952, 961 (1996) (citing as direct evidence of racial motivation Texas’s intent to create majority-minority districts); *see also Miller*, 515 U.S. at 907 (State set out to create majority-minority district).

Further direct evidence is provided by the redistricters’ use of “REDAPPL [which] contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts [and which] enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information.” *Id.* at 961-962.<sup>6</sup> Ryan Downton, who drew the boundaries of HDs 78 and CD23, testified that he turned on racial shading in REDAPPL or watched statistics on Hispanic population as he drew districts. (FOF 563, 621, 1327).

As explained by Ryan Downton, in REDAPPL “I was moving blocks in and out based on the Hispanic shading, if a district needed Hispanic population, I would take part of the precinct that was more Hispanic and put it in, and the Anglo part of the precinct in the other district.” (July 2014 Tr. at 2093:5-2094:11). Gerardo Interiano testified that he drew the

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<sup>6</sup> Texas erroneously claims that election returns and other political data was available in REDAPPL below the precinct level. (State Post-Trial Brief at 36). On the contrary, and as explained by Gerardo Interiano and Ryan Downton at trial, Texas redistricters knew that because election returns are not available below the precinct level, but some redistricters use the block level for redistricting, REDAPPL homogenously disburses political data down to the block level without that data actually being true for the blocks. Task Force Proposed (FOFs 1303, 1310; *see also* July 2014 Tr. at 1628:8-1629:11; Aug. 2014 Tr. 785:11-787:9 (Dyer); July 2014 Tr. 265:22-266:24 (Dyer)).

boundaries of HD117 with shading turned on for SSVR in REDAPPL. (FOF 621) (“we would have had SSVR turned on”).

Redistricters kept a constant eye on race data as they crafted HDs 78 and 117 and CD23. Mr. Downton testified that he worked in REDAPPL with SSVR and political data visible and moved precincts into and out of CD23 to make the district safer for the incumbent Mr. Canseco and to reach a specific Latino demographic. (2011 Tr. at 953:10-16; 955:3-6). Mr. Interiano testified that drawing HD117 was a racial and political “balancing act” to preserve Mr. Garza’s incumbency. (FOF 634). Mr. Interiano testified that while drawing HD117 his process involved “a lot of testing, going back and forth and trying one region and seeing what happened to the numbers, trying another region and trying to see what was the way that we could keep that district at above that benchmark on SSVR [and ensure Mr. Garza’s political viability].” (FOF 652; August 2014 Tr. at 54:3-18). Mr. Downton testified that as he drew the boundary between HD77 and HD78, he looked at block level data for Hispanic population and that he split precincts and moved blocks across the boundaries between House District 77 and 78 based on that Hispanic population. (FOF 562). Mr. Downton testified that while he was mapping in REDAPPL he had the election data on and he selected blocks based on Hispanic shading while keeping an eye on the fluctuations in the plan statistics on political results. (FOF 563).

Texas redistricters made further use of race in HDs 78 and 117 and CD23 by relying on a measure of Latino electoral strength (the OAG10 election analysis), as opposed to indices of partisanship, to craft the districts. (FOF 573-579, 664, 1202-1204, 1214-1215). Mr. Downton testified that he used aggregated election results for ten racially contested elections featuring a Latino and a non-Latino candidate: “I was given certain elections where I was told there was a Latino-preferred candidate of choice, and I looked at those selections.” 2011 Tr. at 957:25-

958:7; 959:23-960:1. Unlike a measure of partisan strength, the OAG10 analysis used only racially contested elections between Latino and non-Latino candidates and specifically measured whether Latino voters were able to elect their preferred candidates across 10 elections. (FOF 1351-1354). The OAG10 was used by redistricters to measure reductions in performance for Latino-preferred candidates in draft districts.

As explained by Stacey Napier, an attorney with the Texas Attorney General's Office in her March 25, 2011 email to Ryan Downton:

LTS (our Legal Technical Support Division) chose 10 contested statewide general elections spanning 2002-2010 and determined who the Hispanic candidate of choice was in each of those elections through their regression analysis. Under the current map, Hispanics In District #1 were able to elect the candidate of their choice **7 out of the 10** times. Under the proposed map, Hispanics In District #1 would be able to elect the candidate of their choice **3 out of 10**.

(US Exhibit 158) (emphasis in original).

The OAG10 did not include political races used by the Texas redistricters to gauge Republican voting strength including McCain in 2008, Perry in 2010 and Abbott in 2010. *Compare* US Exh. 610 *with* 2011 Tr. at 910:9-20 (Downton); July 2014 Tr. at 1579:12-24; 1580:6-15, 19-22 (Interiano); July 2014 Tr. at 105:1-6 (Sweeten). The OAG10 was also not the index known as ORVS, which is typically used to measure Republican voting strength in a district.<sup>7</sup>

The Texas 2011 redistricting was the opposite of a colorblind process. Race was the beginning and end point for the boundary revisions in HDs 78 and 117 and CD23. At the start of the redistricting process, redistricters knew that the incumbents of the challenged districts were not the Latino preferred candidates. (FOF 4, 573-575, 596-607, 1326). Each district

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<sup>7</sup> See Ross Ramsey, Texas Tribune, "Where Republicans Will Hunt Next Year," August 13, 1999, found at <http://www.texastribune.org/texas-weekly/vol-16/no-11/where-republicans-will-hunt-next-year/>

contained a majority of HCVAP and the Latino electorate was growing. (FOF Appx. A at 110, 152; FOF 928, 929). The goal of protecting the incumbents of these districts was uppermost in redistricters' minds. (FOF 185, 495, 578, 595, 599, 1325, 1326). During the redistricting process, redistricters used racial data in REDAPPL and swapped areas into and out of districts based on their racial characteristics, choosing those areas that contributed the fewest votes to Latino-preferred candidates. At the end of the redistricting process, redistricters used the OAG10 to measure the final product's level of Latino voting strength. All of this direct evidence demonstrates that race predominated in the crafting of HDs 78 and 117 and CD23.

#### **4. Circumstantial Evidence of use of Race in HDs 78 and 117 and CD23:**

The final boundaries of HDs 78 and 117 and CD23 show that Texas subordinated traditional race-neutral districting principles, including compactness, respect for political subdivisions, and respect for "communities defined by actual shared interests" to racial considerations. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

As described in the Task Force Plaintiffs' post-trial brief, HD78's extremely irregular "antlers" do not follow the contours of the Franklin Mountains, split 14 election precincts and do so in a way that cannot be explained by neighborhood or socioeconomic characteristics. (FOF 843-887, 895). In Bexar County, HD117 violated every traditional redistricting criteria offered in its defense. HD117 did not stay outside of the City of San Antonio or Loop 410. (FOF 896-898). HD117 did not remain in rural areas, instead taking in heavily-developed Anglo suburban areas. (FOF 899, 900). HD117 also did not conform to boundaries of the Bexar Metropolitan Water District. *Id.*

As drawn by the State, CD23 split Maverick County, La Salle County and Atascosa County, including the cities of Eagle Pass, Jourdanton and Pleasanton and split precincts inside

of those cities. Redistricters also moved 231,514 individuals into CD 23 and 380,677 individuals out of CD23, despite the fact that CD23 was overpopulated by 149,000. (Ex. PL 1029, 1109)

The State's admission that it split Maverick and Atascosa counties to raise the Latino population (after moving areas from CD23 into CD20 to raise the Latino population in that district), provides direct evidence of the predominance of race in the crafting of CD23. *Compare* Texas Post-Trial Brief at 118-119 *with Miller v. Johnson*, 515 U.S. 900, 918 (1995) (citing as direct evidence of the predominance of race Georgia's admission that it added portions of two counties to the challenged district in order to replace Black population that had been shifted to another Black-majority district.)

#### **5. Dallas-Ft. Worth: CD26 and CD6**

In Dallas-Ft. Worth, the redistricter himself provided direct evidence of his predominant use of race. Ryan Downton, the author of the congressional boundaries in Dallas Ft. Worth, testified that he used race as the reason to place Latinos into CD26 in Tarrant County and CD6 in Dallas County. (FOF 1381, 1383, 1381-1391). Additional circumstantial evidence of the predominance of race includes the complete departure of the CD26's 'lightning bolt' and the northern boundary of CD6 from any community of interest or local jurisdictional boundaries.

#### **6. The District Boundaries are Based Predominantly on Race, not Partisanship**

Texas claims that the challenged districts are not subject to strict scrutiny because it used partisanship, not race, to craft boundaries, and that any resemblance to race-based redistricting is merely the result of a correlation between Latino and Democratic voters. *See* State Response Brief at 17 (State drew district boundaries “for a partisan purpose, even when those lines happen to diminish the electoral prospects of the party preferred by minority voters.”).

Specifically, the State defends its actions in HD78, HD117 and CD23 by asserting that it was trying to give incumbents "the best chance of reelection." *See e.g.* State Post-Trial Brief at 114. The parties do not dispute that the State modified HD78, HD117 and CD23 to improve the reelection chances of the incumbents (which had deteriorated as the Latino population grew in the districts). The question is whether the specific actions taken by the State intentionally diluted Latino voting strength or used race as a predominant factor in redistricting without narrowing tailoring to a compelling state interest.

The question of intent was answered by the U.S. Supreme Court in *LULAC v. Perry*. In that case, Texas maintained, as it does here, that "in reconfiguring old CD 23, the Legislature was concerned primarily with incumbency protection and creating a more Republican-friendly district through the removal of reliable Democratic voters who also happened to be Hispanics." Brief of State Appellees at 105, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), 2006 WL 284225. The Supreme Court rejected this argument, and this Court should do the same. As explained by Justice Kennedy, when a district's Latino electorate is growing and presents the possibility of electing the Latino candidate of choice (who is not the incumbent), and the State takes steps to reduce Latino voting strength to give the incumbent "the best chance of reelection," the State's actions bear the mark of intentional discrimination. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006).

The record demonstrates that in each district at issue, HD78, HD117 and CD23, redistricters considered and rejected straightforward approaches to preserving the incumbent. In HD78, Ryan Downton selected a proposal by Marisa Marquez that provided a strongly Anglo district for Rep. Dee Margo. (FOF 521, 534; PL Exh. 503, 505). In HD117, Rep. Garza proposed that his district extend far north into Bexar County to pick up Anglo population in

order to help him get reelected. (FOF 607, 649; PL Exh. 537).<sup>8</sup>

In each instance, redistricters ran up against the requirements of the Voting Rights Act. Because HD78, HD117 and CD23 were existing Latino-majority districts, both section 5 and section 2 cautioned against their removal. The problem for redistricters was that in each district the incumbents faced the possibility that they would lose in the upcoming 2012 election because they were not the Latino candidate of choice. Unwilling to leave the districts with their current level of Latino voting strength, and unable to convert the districts into Anglo-majority districts, redistricters chose a third approach—raise the performance of the districts for Anglo-preferred candidates (as measured by the Latino elections in the OAG10) and keep a nominal majority of Latino population in the district in order to claim compliance with the Voting Rights Act.

In HD78, HD117 and CD23, the redistricters engaged in a painstaking process of modification: using a combination of race and political shading, with either HVAP or SSVR always visible on the REDAPPL screen, redistricters swapped geography into and out of the districts until they found the areas that would provide a majority Latino demographic and best political results for the non-Latino-preferred incumbents. (FOF 561-563, 634, 652, 1305-1306, 1325-1347). Mr. Interiano described the process as a "balancing act" in HD117. (FOF 634). He told Mr. Garza that Mr. Garza could not have his proposed Anglo majority district because the district needed to be at least 50.1% SSVR (FOF 626-630) and then used race and political data to craft a district based on SSVR shading that was exactly 50.1% SSVR. (FOF 651-654). Mr. Interiano also flipped the election results to favor the non-Latino-preferred candidate a majority of the time. (FOF 654-655, 664). The Speaker of the House, Joe Straus, refused to

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<sup>8</sup> In CD23, Rep. Canseco testified regarding plans that would have moved him into a safe district that was Anglo majority and not border-based, but the Legislature did not move Mr. Canseco into an Anglo district. (FOF 1178-1180).

make changes to HD117 when Rep. Joe Farias asked to take back Somerset and Whispering Winds and offered alternatives that maintained the SSVR of HD117. (FOF 662, 671).

In HD78, Ryan Downton used SSVR shading to split 14 precincts and redistrict at the block level (where only race data is available) to craft a district with lower SSVR than the benchmark. (FOF 577, 578, 836). Dee Margo, the Republican incumbent of HD78 was dismayed to learn that he had lost precincts that provided key Republican support. Mr. Downton reached his goal in CD23 when the district had a majority of SSVR and could only elect the Latino-preferred candidate in 1 out of 10 elections. (FOF 1371). As in the State House plan, Mr. Downton used racial shading to swap precincts in and out of CD23 and removed areas of key support for Mr. Canseco in Helotes and South San Antonio. (FOF 1260, 1257-1258). Mr. Downton's changes to CD23 left the Hispanic Republican incumbent worried that he would not be able to secure the nomination in the Republican primary election. (FOF 1256-1258).

The record demonstrates that Texas redistricters subordinated the goal of partisanship to race when drawing the specific boundaries of the challenged districts. *See Miller*, 515 U.S. at 919 (1995) (“Although a legislature's compliance with ‘traditional districting principles such as compactness, contiguity, and respect for political subdivisions’ may well suffice to refute a claim of racial gerrymandering, appellants cannot make such a refutation where, as here, those factors were subordinated to racial objectives.”) (*quoting Shaw I*, 509 U.S. at 647).

The State's express goal of creating Latino-majority "designer districts" that could not elect the Latino-preferred candidate cannot be reconciled with a claim that the State pursued partisan goals and only incidentally affected Latinos. *Compare Hunt v. Cromartie*, 526 U.S. 541, 550 (1999) (citing expert testimony that “the State included the more heavily Democratic precinct much more often than the more heavily black precinct, and therefore, that the data as a

whole supported a political explanation at least as well as, and somewhat better than, a racial explanation.”).

For example, redistricters split Maverick County in order to include half of the county, and half of the City of Eagle Pass, in CD23. In order to support this city and county split with a partisan justification, Texas would have to show that this heavily Latino area was included in CD23 because those Latino voters are strongly Republican. Instead, the State conceded that it placed half of Maverick County into CD23 *because of its racial composition*, and Ryan Downton testified that he did not put more of Maverick County into CD23 because those voters would not support Congressman Canseco. (FOF 1335 and State Post-Trial Brief at 117).

Even if claims of partisan gerrymandering could justify purposefully assigning Latinos (whom the State claims vote Democratic) into districts the State claims it wanted to be Republican, Texas still cannot prevail. The State wrongly asserts that “Plaintiffs refuse to acknowledge any distinction between partisan and racial motivation.” State Post-Trial Brief at 20). If fact, it is the State that seeks to collapse race and partisanship.

Texas offered no evidence that Texas Latinos are “the most loyal Democrats” such that a partisan gerrymander would incidentally adversely affect Latinos. *Hunt v. Cromartie*, 526 U.S. 541 551 (1999). On the contrary, the State’s expert witness testified that Latino voters in Texas are flexible in their partisan affiliation. (FOF 1554, 1589-1592; *see also* Task Force Post-Trial Brief at 117). The redistricters testified that they relied on REDAPPL data based on race (not partisanship) to determine which precincts to include in the challenged districts. (FOF 563, 652, 1327).

This case lies far beyond cases in which partisan affiliation was a better explanation of district lines than race. The North Carolina congressional district that survived strict scrutiny in

*Easley v. Cromartie* included “African–Americans, who register and vote Democratic between 95% and 97% of the time.” *Easley v. Cromartie*, 532 U.S. 234, 245 (2001). There is no evidence in this case that Latinos vote Democratic 95% to 97% of the time. (FOF 1589-1591).

*Hunt* and *Easley* do not speak to the facts here, where the State targeted districts that already contained a majority of HCVAP and in which Latinos were threatening to oust the incumbent. The cases similarly do not speak to redistricting that uses race to achieve a specific demographic number for the sake of being able to claim that a district is “majority Latino” while also using detailed statistical analyses of Latino electoral performance (not partisan analyses) to design a district in which Latino-preferred candidates were unlikely to prevail.

Mr. Downton was unable to explain how pursuit of a partisan goal required him to separate voters on the basis of race and assign Latinos into CD26 and CD6 and African Americans to CD12. (FOF 1394, 1375-1378).

Because race was “the predominant, overriding factor explaining the [Texas’s] decision” to create the specific boundaries of HD78, 117 and CDs 23, 26 and 6, each district “cannot be upheld unless it satisfies strict scrutiny, our most rigorous and exacting standard of constitutional review.” *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

## **7. Texas Offers no Compelling State Interest in its Racial Gerrymanders**

Texas can show neither that it used race in the challenged districts to serve a compelling state interest nor that the district boundaries are narrowly tailored to serve a compelling state interest. *See Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

Unlike the *Shaw* line of cases, Texas redistricters did not craft the challenged districts to “have an effective voting majority of [minority] citizens.” *Shaw v. Hunt*, 517 U.S. 899, 905 (1996). In fact, the opposite was true. Redistricters crafted CD23 in order to ensure that Latino

voters would be able to elect their candidate of choice in no more than 1 out of 10 elections. The State's expert, Dr. Alford, testified that CD23 in C185 "is probably less likely to perform than it was and so I certainly wouldn't count and don't -- in all of this discussion, I haven't counted the 23rd as an effective minority district." (FOF 957). Redistricters also reduced the SSVR in HD117 and HD78 to 47.1% and 50.1% respectively (below benchmark levels), while maintaining substantial Latino voter majorities in adjacent districts. (FOF 681, Appx. A at ¶ 110; FOF Appx. B at ¶ 11). In reaggregated elections, Latino voters are unable to elect their preferred candidates in a majority of racially contested elections in HD117 and HD78. (FOF Appx. B at 111, 112, 153, 154). As the State admits, its redistricters crafted the boundaries of the challenged districts to protect incumbents, not to create effective Latino voting majorities. (State Post-Trial Brief at 17-20).

In Dallas-Ft. Worth, Ryan Downton conceded that his assignment of Latinos to CD26 and 6 was not for the purpose of creating Latino opportunity districts under the Voting Rights Act. (FOF 1387-1388).

Even if the Court were to accept that Texas sought to comply with the Voting Rights Act in redistricting HDs 78 and 117 and CD23, the districts are not narrowly tailored to achieve that result. In order to be narrowly tailored to comply with section 2, "the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance[.]" *Shaw v. Hunt*, 517 U.S. 899, 915-16 (1996). Here, because the districts were specifically crafted to ensure that non-Latino-preferred incumbents would be re-elected, the challenged districts are not narrowly tailored to achieve section 2 compliance. With respect to HD78, as demonstrated at trial, Ryan Downton was told not to use the plan preferred by Chairman Pickett (in which HD78 had a higher SSVR than the benchmark) and

instead based his HD78 on a plan that reduced the SSVR of the district to 45%. (FOF 523, 526, 541-543). Mr. Downton then split 14 precincts and created an extremely irregular boundary for the district when he could have more easily reassigned 5 whole precincts to restore the benchmark SSVR, smooth the “antlers” and maintain communities of interest.<sup>9</sup>

In San Antonio, Mr. Interiano could have retracted HD117, which was overpopulated by over 50,000, towards its core in order to preserve the benchmark level of Latino voting strength. Instead, Mr. Interiano violated every redistricting criteria expressed for HD117, taking in non-rural areas to the north, going into the City of San Antonio and Loop 1604. (FOF 896-899).

In CD23, which was overpopulated by close to 150,000, Sen. Seliger agreed that retracting the district towards the border would have allowed Latino voters to determine the outcome of that election. (FOF 1190). Instead, Ryan Downton shifted hundreds of thousands of people into and out of the district, split cities and counties, and reduced Latino ability to elect. Ex. PL 1109. CD23’s redistricters did not seek to maintain areas with common interests but instead split them to achieve a purely racial goal. (State Post-Trial Brief at 118-119) (“CD 23’s HCVAP and SSVR levels were higher under Plan C170.”); *See Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.”).

Even limiting the inquiry to section 5’s non-retrogression mandate, in this case the challenged districts are not “narrowly tailored to the goal of avoiding retrogression [because] the State went beyond what was reasonably necessary to avoid retrogression.” *Shaw v. Reno*, 509 U.S. 630, 655 (1993). First, because the benchmark HDs 78 and 117, and CD23, had a growing

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<sup>9</sup> The State is mistaken in claiming that the 2010 precinct boundaries available to Mr. Downton during the redistricting process could not have been used to maintain the SSVR of HD78. (*See* State Post-Trial Brief at 73). The Task Force demonstrated at trial, using 2010 precinct boundaries, that Mr. Downton could have reassigned 5 whole precincts to restore the SSVR of HD78 and avoided the “antler” shape of HD77. (July 2014 Tr. 2109:19-2114:2, 2151:15-2151:3; PL Exh. 1007 (corrected)).

majority of Hispanic CVAP, and then were redistricted to offer less Latino electoral opportunity, by definition the State cannot claim to have redistricted for the purpose of avoiding retrogression. Second, as demonstrated in the preceding paragraphs, the redistricted HDs 78 and 117, and CD23 were purposefully designed (based on indices of Latino voting strength) not to elect the Latino-preferred candidate. That goal is inconsistent with avoiding retrogression under section 5.

Thus, Texas has failed to provide the “strong basis in evidence of the harm being remedied” that is required to overcome strict scrutiny of district lines. *Miller v. Johnson*, 515 U.S. 900, 922 (1995).<sup>10</sup>

The State’s further claims that finding a violation of the Fourteenth Amendment here would force unconstitutional “maximization” or the creation of influence districts are red herrings. (State Response Brief at 22-29). A ruling for Plaintiffs would simply restrain the State from using race in areas of existing Latino-majority districts to craft “designer districts” in which Latino voters are selected and de-selected in order to achieve a certain demographic and a minimized level of political strength. A ruling for Plaintiffs would also prevent the State, outside the context of Latino-majority districts, from assigning Latino voters into districts on the basis of race as was done in Dallas Ft. Worth in CDs 26 and 6.

## **B. The Factual Record Strongly Supports Plaintiffs’ Claims of Intentional Discrimination**

### **1. The “Nudge Factor”**

The “nudge factor” describes a method by which a redistricter can craft a district that

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<sup>10</sup> The State’s claim that its race-based districting is ameliorative under the Voting Rights Act is the height of cynicism. As the Supreme Court warned, “[i]t takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.” *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995).

contains a numerical majority of Latino voters but in which the Latino voters cannot elect their candidate of choice. More specifically, the “nudge factor” involves identifying and selecting geography for a district in which Latino voters turn out at lower rates than Anglo voters so that even when Latinos constitute the majority of registered voters, the Latino-preferred candidate usually loses the election.

Mr. Interiano testified that during redistricting he understood Mr. Opiela was trying to draw districts that had demographic benchmarks above a certain level but would elect a candidate who was not the Hispanic candidate of choice. (FOF 1170). Clare Dyer, of the Texas Legislative Council, agreed that use of the “nudge factor” would give the appearance of a Hispanic majority district but the district wouldn’t be capable of electing the preferred candidate of choice. July 2014 Tr. at 273:1-274:7. Senator Seliger agreed that the nudge factor is a point where the population going to the polls would increase Congressman Canseco and Farenthold's chances of winning the district. (FOF 1341). Sen. Seliger testified that he believes using the nudge factor might result in a district where there could be an increase in Hispanic citizen voting age population when compared to the benchmark, but poorer performance for the Hispanic-preferred candidate on Election Day. He also testified that he believes it is possible that if somebody were to use the nudge factor in designing a district, that the district would have a majority Hispanic citizen voting age population, but the Hispanic voters would be unable to elect their candidate of choice. (FOF 1342); *see also* discussion of the “nudge factor” in the Task Force Post-Trial Brief at 94-95.

The record in the case does not include all of the communications between redistricters and others because Texas did not produce them in discovery. For example, almost all of the emails reflecting communications between redistricters came from one source: the Gmail

account of Gerardo Interiano. Texas attempts to exploit the dearth of communications, from Ryan Downton and Doug Davis, for example, to claim that plaintiffs produced insufficient evidence of the use of the “nudge factor” in H283 and C185.<sup>11</sup> *See* State Post-Trial Brief at 30. In fact, there is ample evidence showing that redistricters: discussed the “nudge factor;” had the data available to employ the “nudge factor;” and modified HDs 78 and 117 and CD23 so that they would contain a nominal or close to majority of Latino registered voters but favor the non-Latino-preferred candidate in election outcomes.

Clare Dyer of the Texas Legislative Council testified that the data necessary to employ the “nudge factor” was available in REDAPPL. July 2014 Tr. 265:18-266:21. In addition, Gerardo Interiano made a series of custom data requests of the Texas Legislative Council in late 2010 and early 2011 that sought the information Mr. Opiela said he needed in his “nudge factor” email. (FOF 1173-1175). Ms. Dyer further testified that when she first saw Mr. Opiela’s “nudge factor” email in her 2014 deposition, her mind immediately connected the dots to the custom data requests sent to her by Gerardo Interiano. July 2014 Tr. at 264:14-265:12.

Mr. Opiela frequented exchanged emails with and visited redistricters to share his ideas and draft plans. (FOF 1113-1120). On June 13, 2011, Ryan Downton incorporated much of the draft CD23 sent by Mr. Opiela into the version of CD23 that was enacted in C185.<sup>12</sup> (FOF 1232-1247). House Redistricting Chair Burt Solomons withdrew his support for a redistricting amendment offered by Rep. Aaron Pena (which would have extended CD23 into more of Bexar

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<sup>11</sup> In addition, the State defends its districts in part on claims that the State was trying to accommodate requests from Texas Governor Rick Perry. (State Post-Trial Brief at 125-126, 131). However, when Task Force Plaintiffs requested information from Governor Perry regarding substantive departures from important redistricting factors, the State responded by saying that “[a]lthough Defendant signed the bills for maps C185 and H283, Defendant’s involvement in the legislative process that created the maps was limited.” *See* Appendix B, attached (Interrogatory No. 1 and Response).

<sup>12</sup> Although the State tries to suggest that Mr. Opiela was unhappy with the final configuration of CD23, in fact Mr. Opiela was unhappy with redistricters’ reduction of SSVR in CD20 below the benchmark, a concern that had nothing to do with CD23. (FOF 1249).

County) on the recommendation of Mr. Opiela. (FOF 1251-1253).

Ryan Downton's May 28, 2011 email to Gerardo Interiano and Doug Davis, following Mr. Interiano's question "Any guidance on your 23. Have you been able to make any of the changes that we all discussed?," responded: "Have it over 59% HCVAP, but still at 1/10." (FOF 1215). Mr. Downton's email shows that he was in the process of designing CD23 to include a majority of Latinos but also to ensure that it would not elect the Latino candidate of choice in more than 1 of 10 elections in the OAG10.

Mr. Downton testified that he swapped precincts into and out of CD23 in order to select Latino-majority precincts with certain political results. (FOF 1328). Mr. Downton further conceded that while he was swapping precincts into and out of CD23 it was possible that he was selecting precincts in which Anglos turned out at a higher rate than Hispanics. (FOF 1330). Mr. Downton's description of his technique is the 'nudge factor.'

The final version of CD23 included Latino voters with a 2% lower turnout and non-Latino voters with a 2% higher turnout when compared to benchmark CD23. (FOF 1407). These changes, although not dramatic, "nudged" CD23 down from electing 7 of 14 Latino preferred candidates to 3 of 14 (and in the OAG10 dropped performance from 3 of 10 to one of 10). (FOF 930, 1362; FOF Appx. E at 570; PL Exh. 291 at 79).

Texas does not contest the methodology of the turnout analysis conducted by the Task Force expert witness Dr. Henry Flores, but instead claims that the data shows little change in turnout "between the Bexar County precincts moved in and out of CD 23." State Post-Trial Brief at 122. That statement mischaracterizes Dr. Flores's testimony and the results of his analysis. In Bexar County, the State's changes to CD23 removed 86,433 Latino registered voters with a turnout rate of 23.9% and added 10,469 Latino registered voters with a turnout rate

of 23.5%. PL Ex. 1109. The movement of Latino voters into and out of CD23 in Bexar County had the overall effect of *removing* approximately 76,000 Latino registered voters with a turnout rate of 23.9%. (FOF 1407). This change is significant because the Bexar County Latino voters removed from CD23 were replaced by Latino voters from other parts of the state that had a turnout rate *lower* than 23.9%. (PL Exh. 1109).

As explained by Dr. Flores, in Bexar County “what you have gone and done is removed a group of, well, almost 76,000 Latino voters that have consistent voting patterns.” (Aug. 2014 Tr. at 518:17-23 (Flores)). Dr. Flores continued, with respect to the changes in Latino voter turnout in CD23 “the turnout rates for the Latinos in Bexar and Maverick County were higher, for those that were removed, than the turnout rates of the Latinos who were included from El Paso and the other parts of the Congressional District 11.” (Aug. 2014 Tr. at 519:5-14 (Flores)).

Bexar County aside, the State does not contest Dr. Flores’s conclusion that the changes to CD23 increased the participation gap between Latino and non-Latino voters by 4%. (Aug. 2014 Tr. at 520:6-13 (Flores); PL Exh. 1109).<sup>13</sup>

In HDs 78 and 117, the record shows similarly that redistricters’ modifications to the boundaries of those districts improved the electability of non-Latino-preferred candidates while maintaining the SSVR just below the benchmark. (*See* Task Force Post-Trial Brief at 46-47).

## **2. Split Precincts**

In its post-trial brief, Texas suggests that because precincts *may* be split for non-discriminatory reasons, precinct splits in the challenged plans *must* be non-discriminatory.

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<sup>13</sup> The State’s further contention that the 2010 election was an election “that the mapdrawers did not consider,” is false. State Post-Trial Brief at 121. Texas redistricters testified repeatedly that they measured draft districts against performance in the 2010 election, including the election for Attorney General (Abbott) and Governor (Perry). *See* July 2014 Tr. at 1579:12-24; 1580:6-15, 19-22 (Interiano); *see also* July 2014 Tr. at 105:1-6 (Mr. Sweeten, counsel for Texas: “The evidence will show that [HD41] was drawn utilizing the Abbott 2010 election measures.”); (US Exh. 158) (March 25, 2011 email from Stacy Napier of the Texas Attorney General’s Office to Ryan Downton, providing Downton with analysis including 2010 election).

(State Post-Trial Brief at 35-36). However, the evidence shows that precinct splits in HD 78 and CD23, CD6 and CD26 lack any non-racial justification.

First, although the State tries to claim that “the Texas Legislature had no general policy regarding split precincts,” (State Post-Trial Brief at 36), Rep. Pickett testified that Redistricting Committee Chairman Solomons asked him not to split precincts and “put the fear of God” into him not to split precincts in the proposed plan for El Paso County. (FOF 839). Chairman Solomons also spoke on the House floor in opposition to a redistricting amendment in Bexar County because it split precincts. (FOF 895).

Second, contrary to the State’s claims, the smallest level of geography at which election data is available is the precinct. Although REDAPPL provides election data at the block level for the purpose of being able to sum up blocks in split precincts, the election data is pushed down into blocks based on population and does not reflect actual votes cast in those blocks. (FOF 841, 1310; US FOF 121-124).

Ryan Downton split 14 precincts along the boundary of HD77 and HD78 in El Paso County without any regard for traditional redistricting criteria.<sup>14</sup> (FOF 561). His precinct splits stranded neighborhoods adjacent to the Franklin Mountains and created elongated “antlers” in HD77. Mr. Downton testified that as he drew the boundary between HD77 and HD78, he looked at census block level data for Hispanic population and that he split precincts and moved blocks across the boundaries between House District 77 and 78 based on that Hispanic population. (FOF 562). Mr. Downton’s precinct splits show that he could have included more Latino population in HD78 by keeping precincts whole but split precincts instead to achieve the exact result of 47.1% SSVR and his political goals. (FOF 560; *see also* July 2014 Tr. at

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<sup>14</sup> At trial, Mr. Downton tried to change his previous testimony that in the House plan there was no need to split precincts to equalize population. July 2014 Tr. at 2115:22-2001:21 (Downton).

2117:23-2119:4; PL Exh. 1012-1014).

In CD23, Ryan Downton split precincts in the City of Eagle Pass in Maverick County, and in the cities of Pleasanton and Jourdanton in Atascosa County. He also split precincts in Bexar, El Paso and La Salle counties. (PL Exh. 1633). Twelve of the precinct splits came from Mr. Opiela. (Aug. 2014 Tr. at 1750:7-24 (Downton)). Mr. Downton used the Census Block layer to split these precincts and offered no non-racial justification for the precinct splits. For example, when asked why he split precincts two and three ways in the Harlandale area of South San Antonio, Mr. Downton claimed not to know the area and offered no justification for his splitting the precincts. (Aug. 2014 Tr. at 1751:20-1754:4 (Downton)). When asked why he split precincts in the City of Eagle Pass, which is heavily Latino, Mr. Downton claimed he was unaware that he had split precincts. (FOF 1456; *see also* Aug. 2014 Tr. at 1755:17-22 (Downton)).

In Tarrant County, Mr. Downton split 14 precincts with the “lightning bolt” of CD26 and an additional 4 precincts with the boundary between CD12 and CD33. (FOF 1393). Mr. Downton further testified that he turned on racial shading in order to draw the “lightning bolt” of CD26 and that he used racial shading in REDAPPL to assign voters to districts on the basis of their race. In Dallas County, Mr. Downton split 23 precincts and his boundaries for CD6 attempted to keep Latinos in CD6. Mr. Downton conceded that he did not assign Latinos to CD26 or CD6 to create Latino opportunity districts. (FOF 1376-1378, 1383-1394; PL Exh. 1633).

### **3. *Arlington Heights* Factors**

The parties agree that *Arlington Heights* “identifies sources of evidence that may be relevant to the question whether a legislative body acted for a discriminatory purpose.” (State

Post-Trial Brief at 38). The Task Force Plaintiffs' post trial brief reviews at length the evidence that falls under each *Arlington Heights* factor and the Task Force Plaintiffs will not repeat that analysis here. (*See* Task Force Post-Trial Brief at 25-65, 70-109).

To the extent the State claims that "Plaintiffs have failed to identify departures from the normal procedural sequence," the State is wrong. (State Post-Trial Brief at 39). Focusing on the facts that the Legislature held few hearings on its draft plans and enacted the plans in a short time period, the State claims that can be no discrimination when the Legislature's actions "affected all members of the public equally." (State Post-Trial Brief at 41). The State's reliance on a case in which a town closed its public pools rather than desegregate the pools proves the point. In the 2011 redistricting process, although all members of the public were affected by the rushed schedule, the burden did not fall equally on the basis of race. It was minority individuals who suffered the greater injury when they lost the opportunity to suggest fairer alternatives to the redistricting plans and when their voting strength was diluted in the enacted plans.

The State ignores facts showing that it violated its own process in ways that led to a discriminatory outcome. With respect to HD78 and HD117, the House leadership gave primary responsibility for drafting the delegations' maps to Rep. Pickett and Rep. Villarreal then ignored their proposals and used redistricting staff behind closed doors to craft HD78 and HD117 with less Latino opportunity than the benchmark. (FOF 526-528, 536, 538628-634, 640-653).

Although the redistricting leadership established a process by which it gave its draft House plans to David Hanna for review for compliance with the Voting Rights Act, the leadership then ignored calls by Mr. Hanna to consider placing an additional Latino-majority section 2 district in Harris County and ignored his concerns about the elimination of CD33 in Nueces County. (FOF 472-473, 769). When it embarked on congressional redistricting, the

leadership changed course and did not ask Mr. Hanna to prepare any memos evaluating compliance with the Voting Rights Act. Nevertheless, Mr. Hanna showed redistricting staff proposals for CD23 to his boss at the Texas Legislative Council, Jeff Archer, and both relayed their concerns about CD23 and Voting Rights Act compliance. The Legislature did not address the Legislative Council lawyers' concerns about CD23. (FOF 1474).

#### **4. Specific Districts**

The State makes repeated references to the racial and partisan composition of House county delegations, suggesting that a redistricting plan cannot be discriminatory if it was drawn by a "Democratic Representative" or "a Hispanic Democrat." *See, e.g.* State Post-Trial Brief at 66 and 53. Just as it would be inappropriate to assume that a plan is discriminatory if drawn by Republicans or Anglos, it is inappropriate to assume that a plan is non-discriminatory if drawn by Democrats or Latinos.

#### **5. HD78 and HD117**

More important, the record makes clear that the "Democrat[s]" and "Hispanic Democrat[s]" that the State claims drew HD78 and HD117 did not draw the districts. Although Redistricting Chairman Burt Solomons asked Rep. Pickett to lead the El Paso County delegation's redistricting effort, and Rep. Pickett created a plan, secured the signatures of all the delegation members and sent that plan to Chairman Solomons, redistricters instead took up a different plan, one with 'antlers,' and then elongated the 'antlers' to create a final product with 47.1% SSVR in which the Latino preferred candidate was not likely to prevail.<sup>15</sup> (FOF 488-

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<sup>15</sup> Rep. Pickett testified that the map with the delegation members' signatures that he gave to the redistricting committee resembled the 'chef's hat' map with no western antler. (FOF 524, 528). At trial, Mr. Downton was forced to retreat from his testimony that Mr. Pickett gave him an 'antler' map when Mr. Downton conceded that he received the 'antler' map electronically from Ms. Bruce. (FOF 541-542). Chairman Solomons testified that although he had received 'chef's hat' versions of HD77 from Rep. Pickett in which HD78's SSVR was above the benchmark, the redistricting committee moved forward with the version of the map in which HD77 had 'antlers' and HD78 had an SSVR below the benchmark.

581).

Redistricters were certainly aware that El Paso County could contain compact districts that respected communities of interest and distributed the Latino population more equally. At 9:00pm on the day House Redistricting Chairman Solomons released the committee's redistricting proposal (which contained the 'antlers' configuration for HD77 and HD78) Gerardo Interiano was at his desk viewing Plan STRJH244 in his REDAPPL account. (FOF 569-572). Plan STRJH244 included a compact HD78 with 52.6 % SSVR. Mr. Interiano copied the plan, re-named it "El Paso VRA" and forwarded it as Plan STRJH245 to David Hanna at the Texas Legislative Council. *Id.* The "El Paso VRA" configuration was never incorporated into the final House Plan H283.

In Bexar County, although Rep. Michael Villarreal was in charge of coordinating the efforts of the delegation, and he sent at least nine redistricting proposals on behalf of the delegation to Gerardo Interiano, Mr. Interiano worked behind closed doors with Rep. Garza and staff to craft the final version of HD117, which had a lower election performance for the Latino-preferred candidate than any version of HD117 in Rep. Villarreal's plans. (FOF 582-682, 918).

Representative Garza made statements reflecting racial intent throughout the process. Representative Garza testified that at the start of redistricting, he wanted to spin HD117 farther north because that area tended to be more Anglo and more conservative. (FOF 607). After he was told by Mr. Interiano that he should have at least 50% SSVR, Mr. Garza worked with Mr. Interiano to move the low Latino turnout areas of Somerset and Whispering Winds into HD117 and told Rep. Farias, "Joe, all I want is more Mexicans in my district." July 2014 Tr. at 335:14-15; *see also* (FOF 613, 639). Mr. Garza's reference to Mexican American voters in the pejorative as "Mexicans" offended Rep. Farias who testified:

All I know is that I got very upset because I didn't like the way he used the word Mexicans. And I told him if you want more Mexicans, John, you need to draw your map 150 miles south because here we have Latinos and we have Hispanics. So we can talk about that, but we're not going to talk about Mexicans.

(July 2014 Tr. at 335:5-336:5).

The State is disingenuous when it claims that “the meaning of Representative Garza’s alleged statement is unclear.” (State Post-Trial Brief at 57). Rep. Farias was upset by Mr. Garza's use of the term “Mexicans” for Mexican Americans because it is offensive. Rep. Farias’s statement in response also shows that he understood the use of the term “Mexicans,” in reference to United States citizens of Hispanic descent, to insult Mexican Americans by denying their American citizenship. “Mexicans” is not a redistricting term; redistricting relies on terms such as Hispanic, Latino or Spanish-surnamed registered voters; in this specific instance, Rep. Garza was trying to gain Spanish-surnamed registered voters in Somerset and Whispering Winds but he referred to these voters as "Mexicans."

The State is incorrect when it argues that the selection of Somerset and Whispering Winds for HD117 was race neutral because Republican candidates did well in those areas. Rep. Farias testified that as a Democrat he lost the precincts in this area because Latino voter turnout was low. July 2014 Tr. at 337:4-7. Representative Garza testified that he believed rural Hispanic turnout would be low and that Hispanic turnout in Somerset was low. (FOF 613, 639). The evidence shows that in order to help Rep. Garza win reelection, and at the same time create a district with 50.1% SSVR, Gerardo Interiano and Rep. Garza pulled HD117 out of heavily Latino areas on the South Side of San Antonio and extended the district into the low turnout Latino areas of Somerset and Whispering Winds. (FOF 633, 634, 652, 655). Rep. John Garza did not accept any of the draft maps proposed by Rep. Farias that raised District 117 above 50.1% SSVR, including plans with SSVR at 50.3% and 50.4%. (FOF 673).

## 6. Nueces County and HD33

The State does not contest that in the benchmark House plan, Nueces County contained two Latino opportunity districts and the citizen voting age population of Nueces County was 54.6% Hispanic, thus allowing for two districts wholly contained within the county to be majority HCVAP. (FOF 742). However, maintaining two Latino opportunity districts in Nueces County in 2011 would have required redistricters to place Rep. Todd Hunter in a Latino-majority district (because the Legislature had decided that the County Line Rule required two districts to be wholly contained in Nueces County). Instead of providing two Latino opportunity districts, redistricters created one Latino opportunity district, pushing the majority of Nueces County's Latino voters into HD34, and created an Anglo majority district wholly contained in Nueces County for Rep. Hunter.

The State tries to distract from the obvious dilution of its map in Nueces County by arguing that the elimination of a Latino opportunity district was required by the County Line Rule. This argument fails for two reasons. First, as described above, there is sufficient Latino citizen voting age population to fulfill the first *Gingles* precondition for two Latino-majority districts inside Nueces County. The State is well aware that "[t]he 50% HCVAP threshold was important because if such a district could have been drawn, it likely would have been required under the Voting Rights Act[.]" See State Post-Trial Brief at 132. Redistricters knew the applicable standard under section 2 is CVAP and applied that standard to the creation of CD35 and to evaluate whether a Latino-majority congressional should be drawn in Dallas Ft. Worth. (See State Post-Trial Brief at 116 (referring to "CD35, a new HCVAP-majority district[.]"), at 126 ("[Ryan Downton] considered racial data in Travis County to reach the 50% HCVAP threshold, which he thought was necessary to comply with Section 2.") and at 132). Gerardo

Interiano's use of an SSVR standard, instead of HCVAP, in order to conclude that two Latino opportunity districts could not be created in Nueces County was pretextual.<sup>16</sup> (FOF 735-736, 738).

Second, even if complying with section 2 required going outside the boundary of Nueces County, under the Supremacy Clause the County Line Rule would have to yield to section 2. Although the County Line Rule is a traditional redistricting criteria in Texas, that does not mean that the County Line Rule halts the section 2 inquiry. *See Sanchez v. State of Colo.*, 97 F.3d 1303, 1315 (10th Cir. 1996) (concluding that the district court had "incorporated considerations and attributes... that are irrelevant to the inquiry... [and] overburdened plaintiffs' showing with concerns better left for its later analysis."). Texas redistricters were advised by the Legislative Council that the County Line Rule would have to yield to section 2. (FOF 752-753). Texas had a strong basis in evidence to conclude that section 2 required the maintenance of the two Latino opportunity districts in the county. With respect to the first *Gingles* precondition, the fact that the county itself was majority HCVAP demonstrated that the Latino population was sufficiently numerous and compact to comprise the majority of two districts. (US Exh. 46 at 21). In addition to evidence satisfying the first *Gingles* precondition, voting was racially polarized in Nueces County. (FOF 132-135). Despite the warnings of David Hanna that the elimination of a Latino opportunity district in Nueces County could create problems under section 5 of the Voting Rights Act (Def. Ex. 192), redistricters chose to eliminate the Latino-majority HD33. (FOF 770, 757-759).

Although the State suggests in its post-trial brief that two HCVAP majority House

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<sup>16</sup> Although the State claims that "Nueces County's level of *Spanish-surnamed registered voters* was just under 50%," (State Post-Trial Brief at 96, emphasis added), the legal requirement is CVAP, not SSVR. *See Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999). The American Community Survey report by the U.S. Census (averaging data for 2005-2009), that was available in 2011 showed that the HCVAP of Nueces County was 54.6%. (US Exh. 46 at 21).

districts in Nueces County would not have been effective opportunity districts (*see* State Post-Trial Brief at 96-98), the State offered no evidence showing that redistricters conducted election analysis or made any other investigation into this idea before eliminating HD33.

## **7. CD 23**

While not disputing its use of race in crafting CD23, the State tries to minimize the effect of its radical changes by claiming they do not affect the political outcome of elections in the district. (State Post-Trial Brief at 115). The State's own election analysis disproves that claim. The OAG10 shows that the State's changes to CD23 reduced the success rate of Latino-preferred candidates from 3 to 1 in 10 elections. Data from the Texas Legislative Council shows that the State's changes to CD23 reduced the success rate of Latino-preferred candidates from 7 to 3 in 14 elections held in the same time period as the OAG10. Dr. Alford testified that CD23 “is probably less likely to perform than it was and so I certainly wouldn't count and don't -- in all of this discussion, I haven't counted the 23rd as an effective minority district in the newly adopted plan, but it does remain a majority district.” (FOF 957). Dr. Alford conceded that he would prefer to use exogenous election analysis over the later election analysis that he provided at trial in 2014, which purported to aggregate votes from a collection of different congressional districts. (Aug. 2014 Day 6 Tr., 1883:8-1883:10, Aug. 16, 2014). Dr. Alford further conceded that he would not use his later analysis in lieu of exogenous election analysis. (Aug. 2014 Day 6 Tr., 1883:4-1883:7, Aug. 16, 2014). The exogenous election analyses in this case, including the OAG10 and the 14 elections presented by the Task Force for the same time period, showed a drop in performance for Latino-preferred candidates in CD 23.

## **8. CD 27**

The State does not dispute that the assignment of Nueces County to an Anglo-majority

district removed 200,000 Latinos from the South Texas configuration of congressional districts. Ex. PL 299. This loss of Latino population from Latino congressional districts constrained the ability to create the new CD35 and maintain Latino opportunity districts CD23 and CD20. Although the State claims that witnesses at field hearings spoke in favor of placing Cameron and Nueces County in separate districts, because the hearings were not transcribed until after this case was filed, there is scant evidence redistricters were aware of any requests to separate Cameron and Nueces Counties. (FOF 694-695). Redistricters made no attempt to determine whether Nueces County was the "anchor" of CD27 in the benchmark plan. (FOF 735, 1503-1504). Ryan Downton received his directives from Rep. Todd Hunter. State Post-Trial Brief at 128. Furthermore, Rep. Todd Hunter conceded that no Latino elected official or hearing witness asked for Nueces County to be placed in an Anglo-majority congressional district. (FOF 1297).

#### **9. Dallas Ft. Worth**

With respect to Dallas Ft. Worth, the State cannot support its claim that "to the extent race was a factor in the creation of CD12 and CD26, it was considered only to correct the inadvertent fracturing of minority communities." State Post-Trial Brief at 130. Ryan Downton, the author of CD26 and CD6, testified that he used race to assign Latinos to those districts because he was unfamiliar with the communities in the area. (FOF 1377); *see also* State Post-Trial Brief at 134-135. Mr. Downton further testified that he used race as a proxy for community of interest when assigning Latinos to CD26 and CD6. (FOF 1378). Ryan Downton relied on block level race data and split precincts on the basis of race when he redistricted. (FOF 1378, 1393-1394). Mr. Downton also did not use an overlay of the House redistricting plan to use the boundaries of HD90 as a proxy for community of interest. (FOF 1380).

### C. Vote Dilution Under Section 2

Although Texas does not address vote dilution evidence directly in its post-trial brief, it incorrectly maintains that there can be no vote dilution in Cameron and Hidalgo counties in the State House plan because even under H283, “every resident of each county would have resided in a Hispanic opportunity district.” (State Post-Trial Brief at 101). The Task Force Plaintiffs’ claim is that the State failed to create an additional Latino opportunity district in the Rio Grande Valley. The State misses the critical difference between the voters of Cameron and Hidalgo Counties living in *six* Latino opportunity districts versus living in *seven* Latino opportunity districts.

The new Latino-majority congressional district in C185, CD35, is required by section 2 of the Voting Rights Act. (*See* Task Force Post-Trial Brief at 11-12). Although some parties in the case argue that CD35 should not have been drawn because Latinos in South and Central Texas are “without a § 2 right” (Joint LULAC, Quesada and Rodriguez Post-Trial Brief at 39), that argument is flawed in at least two ways.

First, the boundaries of CD35 are reasonable and do not reveal that Latinos are “without a § 2 right.” When evaluating whether Latinos satisfy the compactness component of the first *Gingles* precondition under section 2, the Court must examine the compactness of Latino community in the region. *See LULAC v. Perry*, 548 U.S. at 433 (the compactness inquiry under § 2 examines the compactness of the minority community, not the compactness of the contested district). All parties agree that Latinos in South and Central Texas are sufficiently compact to comprise the majority of a congressional district. Numerous proposals offered by members of the 2011 House and Senate Redistricting Committees, as well as proposals offered by plaintiffs in this case, encompass the compact Latino community in South and Central Texas

in a section 2 district. *See, e.g.*, PLAN C126 (Rep. Alvarado Statewide Proposal) *available at* DistrictViewer, <http://gis1.tlc.state.tx.us/> (December 3, 2014); PLAN C131 Sen. Gallegos Statewide Substitute) *available at* DistrictViewer, <http://gis1.tlc.state.tx.us/> (December 3, 2014); Ex. J-3, PLAN C122 (Task Force Congressional Proposal A); PLAN C211 (MALC Interim Congressional Proposal), *available at* DistrictViewer, <http://gis1.tlc.state.tx.us/> (December 3, 2014); (*see also* Joint LULAC, Quesada and Rodriguez Post-Trial Brief at 41-42 (approving the CD35 in C220 which is located in South and Central Texas)).

The fact that Texas created CD35 to comply with section 2 and incorporated other state priorities does not render CD35 illegal, even if plaintiffs proposed more compact versions of CD35. *See Bush v. Vera*, 517 U.S. 952, 977 (1996) (“A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless ‘beauty contests.’”). For example, the record demonstrates that the State narrowed the corridor of CD35 at Guadalupe County to accommodate the request of Republican State Representative Edmund Kuempel to keep most of Guadalupe County whole and to accommodate the request of Democratic State Representatives Joaquin Castro and Michael Villarreal who wanted CD35 to be weighted more heavily towards Bexar County. (2011 Tr. at 917:24-921:12; 991:11-20). There is significant Latino population in Guadalupe County and throughout the region between San Antonio and Austin; the evidence does not show that CD35's boundary narrows because there are no Latinos living in the area. *See Miller v. Johnson*, 515 U.S. 900, 908 (1995) (discussing racial gerrymander's use of land bridges through areas *without* African American population).

Although accommodating legislators' requests reduced the compactness measures of

CD35, the evidence showed that the State balanced traditional redistricting criteria, including respect for county boundaries and accommodating legislators' wishes, with the need to create a remedial district under section 2. In these situations, "the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Bush v. Vera*, 517 U.S. 952, 978 (1996).

The shape of CD35, or any other district, is only relevant to two inquiries. First, district shape is relevant under section 2 when courts evaluate whether minority plaintiffs can satisfy the first *Gingles* precondition. As explained above, there is ample evidence showing that Latinos in South and Central Texas are sufficiently numerous and compact to comprise the HCVAP majority of a congressional district. Unlike CD25 in *LULAC v. Perry*, which had a "300-mile gap between the Latino communities . . . and a similarly large gap between the needs and interests of the two groups" (*LULAC v. Perry*, 548 U.S. at 432), CD35 in C185 connects areas with similar features, including their urban nature, similar housing and similar workforce characteristics. (FOF 982-990, 1041-1057; *see also* Appendix A (attached)). Residents of CD35 travel up and down the I-35 corridor to visit family and friends and there are strong familial and community ties throughout the area of CD35. (Aug. 14, 2014 Tr., 1133:24-1134:10, 1136:12-21, 1160:25-1161:4, 1168:23-25; PL Exh. 416 ¶ 30).

The linkage of Travis and Bexar Counties is not "unusual." (*See* Joint LULAC, Quesada and Rodriguez Post-Trial Brief at 42). In fact, Travis and Bexar Counties were linked by a single district in the congressional redistricting maps of 2011, 2006, 2001, and 1991. *See* PL Ex. 304, 305, 306. The Texas Legislature's decision to link Travis and Bexar Counties in CD35

in C185 conforms to traditional redistricting practice in Texas.

Second, district shape is relevant to whether the State elevated race over other considerations in violation of the Fourteenth Amendment. No party advances that argument in its post-trial briefing and the record does not support a *Shaw* argument against CD35. There is no evidence that in CD35 the consciousness of race necessary to create a section 2 remedial district for Latinos was overcome by the elevation of race over other redistricting criteria.<sup>17</sup> Thus, there is no basis on which to conclude that CD35 “subordinate[d] traditional districting principles to race substantially more than is ‘reasonably necessary’ to avoid § 2 liability.” *Bush v. Vera*, 517 U.S. 952, 979 (1996).

The parties attacking CD35 in C185 also inaccurately contend that voting is not racially polarized in Travis County. Putting aside the fact that arguing against polarized voting in Travis County makes the case for a coalition-crossover<sup>18</sup> district in Travis County impossible, the Task Force Plaintiffs established that voting is racially polarized in Travis County. Dr. Richard Engstrom analyzed 22 racially contested general and primary elections conducted from 2006-2012 and concluded that voting in Travis County is racially polarized. (FOF 149-152). In general elections, although there is some Anglo support for Latino-preferred candidates, the majority of Anglo voters voted for the non-Latino-preferred candidates in eight out of nine elections. PL Exh. 392 at Table 8. Dr. Engstrom found a similar pattern for Anglos in 5 of 8 Democratic Primary elections in Travis County. *Id.*

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<sup>17</sup> Dr. Ansolabehere, on behalf of the Rodriguez plaintiffs, offered no opinion with respect to whether race was the predominant factor in drawing CD35, did not examine neighborhood characteristics in Travis County to see how they might correlate to the boundaries of Congressional District 35 and did not examine whether Texas determined that it was required by section 2 to draw a Hispanic majority district in CD35. (Aug. 2014 Day 3 Tr., 985:23-988:8).

<sup>18</sup> Certain parties contend that benchmark CD25’s 9% BCVAP combined with the 25.3% HCVAP to vote together as a coalition, with the additional crossover assistance of some of the district’s 63.1% Anglo CVAP. Benchmark CD25 is neither a coalition district, in which two minority groups combine to form the majority of the electorate, nor a crossover district, in which white voters cross over to help a single minority group elect its candidate of choice. *See Bartlett v. Strickland*, 556 U.S. 1, 14-15 (2009); (US Exh. 701).

No party contested Dr. Engstrom's conclusions; even the expert witness for the State testified that Dr. Engstrom is prominent in his field, his report is credible and Dr. Engstrom chose a good methodology to use in his report, concluding that Dr. Engstrom "did the best job of covering geography and using the best methodology." (FOF 175-177). Furthermore, the State conceded at trial that voting is racially polarized in Travis County. (FOF 93).

Of note, in all the counties that he studied, Dr. Engstrom found that African Americans showed the highest degree of polarization from Latinos in Democratic Primary elections in Travis County. PL Exh. 392 at 23-24, Table 8. In 7 of the 8 Democratic Primary elections that he examined, Dr. Engstrom found that the majority of African Americans voted against the Latino-preferred candidate; the only Democratic Primary election in which African Americans shared a candidate preference with Latinos was an election in which the Latino-preferred candidate was Anglo. PL Exh. 392 at Table 8.

Thus, not only does racially polarized voting in Travis County support including portions of Travis County in a section 2 remedial district for Latinos, the specific nature of racially polarized voting in Travis County supports including Latinos in a Latino-majority district in which they can nominate and elect their candidate of choice, as opposed to creating a Latino influence district in which the Latino-preferred candidate is filtered out by Anglo and/or African American voters.<sup>19</sup>

In the end, the attack on CD35 relies on a paradoxical argument: the Voting Rights Act requires Texas to protect minority voting rights with a 65% Anglo district in Central Texas, but not with a Latino-majority district.

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<sup>19</sup> Dr. Ansolabehere, on behalf of the Rodriguez plaintiffs, offered no opinion about how often Travis County Anglo or African-American voters support the Latino-preferred candidate in racially contested Democratic Primary elections. Aug. 2014 Tr. at 1005:10-21. Dr. Ansolabehere also conducted no analysis of exogenous or endogenous Democratic Primary elections within the boundaries of benchmark CD25. (Aug. 2014 Tr. 990:10-992:16; 996:22-998:5).

The parties attacking CD35 also present a false choice between creating a section 2 remedial district for Latinos and creating their desired tri-racial Democratic district in Travis County. It is certainly possible to create both, with the tri-racial district encompassing Democratic precincts outside the boundaries of CD35. Those separate decisions—whether to draw a section 2 remedial district for Latinos and whether to draw a tri-racial Democratic district in Travis County beyond the boundaries of CD35—depend on separate legal evaluations and creating one district does not preclude creating the other. In sum, any obligation to create a tri-racial Democratic district in Travis County does not require trading away the section 2 rights of Latino voters.

#### **D. Procedural Posture and Bail-in**

There is no basis for the State’s argument that Fourteenth Amendment violations that involve the elevation of race in redistricting cannot form the basis of bail-in under section 3(c) of the Voting Rights Act. (State Post-Trial Brief at 13). Section 3(c) provides that a court may order a jurisdiction to comply with the preclearance provisions of section 5 “in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment” where the “court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred[.]” 42 U.S.C. § 1973a(c). No language in section 3(c) excludes violations of the Fourteenth Amendment that involve predominant use of race in district line-drawing. The “voting guarantees of the fourteenth or fifteenth amendment” include the guarantee that voters will not be assigned to districts predominantly on the basis of race. Assigning voters to a district on the basis of race and without justification creates no less an injury under the Fourteenth Amendment than intentional vote dilution:

Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

*Shaw v. Reno*, 509 U.S. 630, 657 (1993).

The purpose of section 3(c) is to provide an additional equitable remedy for courts when dealing with intentional voting discrimination. The basis for a court's section 3(c) order need not be the widespread and rampant discrimination that justified the preclearance coverage formula that extended throughout the South. Instead, courts may tailor the section 3(c) remedy, taking into account the time period, jurisdiction, and type of voting changes at issue. *See, e.g., Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990); *Sanchez v. Anaya*, No. 82-0067 (D.N.M. Dec. 17, 1984).<sup>20</sup>

The State is also incorrect when it claims that relief for vote dilution in H283 and C185 is either impossible or unnecessary. First, the State incorrectly claims that unless a district is used in an election, it cannot be found discriminatory. (State Post-Trial Brief at 61). In fact, federal courts routinely hear Fourteenth Amendment challenges to redistricting plans that have not yet been used in an election. *See, e.g., Balderas v. Texas*, 536 U.S. 919 (2002) (Fourteenth Amendment challenge to 2001 Texas redistricting plan); *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (subsequent history omitted) (Fourteenth Amendment challenge to 2003 Texas

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<sup>20</sup> *See also Blackmoon v. Charles Mix Cnty.*, No. 05-CV-4017 (D.S.D. Dec. 4, 2007); *Kirkie v. Buffalo Cnty.*, No. 03-CV-3011 (D.S.D. Feb. 10, 2004); *United States v. Bernalillo Cnty.*, No. 93-156-BB/LCS (D.N.M. Apr. 22, 1998); *United States v. Alameda Cnty.*, No. C95-1266 (N.D. Cal. Jan. 22, 1996); *United States v. Cibola Cnty.*, No. 93-1134 (D.N.M. Apr. 21, 1994); *United States v. Socorro Cnty.*, No. 93-1244 (D.N.M. Apr. 11, 1994); *Garza v. Cnty. of Los Angeles*, No. 88-5143 (C.D. Cal. Apr. 25, 1991); *United States v. Sandoval Cnty.*, No. 88-1457 (D.N.M. May 17, 1990); *United States v. McKinley Cnty.*, 86-0029-C (D.N.M. Jan. 13, 1986); *Woodring v. Clarke*, No. 80-4569 (S.D. Ill. Oct. 31, 1983) (Alexander County); *McMillan v. Escambia Cnty.*, No. 77-0432 (N.D. Fla. Dec. 3, 1979); *United States v. Thurston Cnty.*, No. 78-0-380 (D. Neb. May 9, 1979); *United States v. Vill. of Port Chester*, No. 06-15173 (S.D.N.Y. Dec. 22, 2006); *Brown v. Bd. of Comm'rs*, No. CIV-1-87-388 (E.D. Tenn. Jan. 18, 1990) (City of Chattanooga); *Cuthair v. Moteczuma-Cortez Sch. Dist. No. RE-I*, No. 89-C-964 (D. Col. Apr. 8, 1990); *NAACP v. Gadsden Cnty. Sch. Bd.*, 589 F. Supp. 953 (N.D. Fla. Mar. 6, 1984).

redistricting plan); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992) (Fourteenth Amendment challenge to North Carolina redistricting plan); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630 (1993) (Fourteenth Amendment challenge to North Carolina redistricting plan); *Terrazas v. Slagle*, 789 F. Supp. 828, 834 (W.D. Tex. 1991), *aff'd*, 506 U.S. 801 (1992) (Fourteenth Amendment challenge to 1991 Texas redistricting plan).

Second, as explained above, even assuming that the Court's interim plans made progress towards ameliorating vote dilution in the districts they modified, the interim plans (and subsequent legislative adoption of the plans) did not address all of plaintiffs' claims of vote dilution, including the lopsided allocation of Latino voting strength across El Paso and Bexar County House districts, the loss of a second Latino opportunity state house district in Nueces County, the failure to increase the number of Latino opportunity state house districts in South Texas, the loss of Nueces County to the Latino opportunity congressional districts in South Texas and the lopsided distribution of Latino voting strength across South and West Texas congressional districts.

This case also involves specific decisions made by Texas to draw its district lines. Those decisions, including the refusal to draw new Latino districts where population increases warranted new districts, inconsistent application of VRA standards during the drawing process, refusal to conduct VRA review of plans, using race to create Latino districts with less opportunity to elect Latino-preferred candidates, and elevation of the County Line Rule over federal law, persist in the Court's interim plans and the 2013 legislative plans.

The State wants to rely on its 2013 legislative adoption of the Court's interim plans (in whole or in large part) to erase the record of intentional discrimination present in the 2011

redistricting process. By doing this, the State hopes to avoid a finding of liability under the Voting Rights Act and possible bail-in. The Court should not accept the State's invitation to discard the adjudication of H283 and C185. Instead, the Task Force Plaintiffs request that the Court make its findings of fact and conclusions of law with respect to H283 and C185 and also carry those findings and conclusions forward to adjudicate the challenges to the 2013 plans.

The Court recognized that there remains an “ongoing controversy concerning the legality of certain portions of the plan[.]” ECF 1104 at 15. The State’s legislative adoptions of these plans, in whole or in part, did not resolve the challenges brought by plaintiffs.

### **III. CONCLUSION**

For the foregoing reasons, Plans C185 and H283 discriminate against Latinos in violation of the U.S. Constitution and the Voting Rights Act of 1965.

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Respectfully submitted,

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**Certificate of Service**

I hereby certify that on this 4<sup>th</sup> day of December, 2014, I served a copy of the foregoing Response Brief on all counsel who are registered to receive NEFs through this Court's CM/ECF system. All attorneys who are not registered to receive NEFs have been served via email.

/s/ Nina Perales  
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